91-1599

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARK M. SCHWARMAN,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARK M. SCHWARMAN
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QUESTION PRESENTED

Does the Office of Personnel Management violate a petitioner's due process rights under the V Amendment by removing a petitioner from Federal employment without allowing an Oral answer as prescribed by 5 U.S.C. § 7513 (b) (2) ?

LIST OF PARTIES

The parties to the proceedings were the petitioner Mark M. Schwarman and the respondent Office of Personnel Management.

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OFFICE OF PERSONNEL MANAGEMENT,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner Mark M. Schwarman respectfully prays that a writ of ceritorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on November 26, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reprinted in the appendix hereto.

JURISDICTION

Invoking 5 U.S.C. § 7701, the petitioner sought relief from the Merit Systems Protection Board. On May 14, 19991 the Full Board denied the petition for review.

Petitioner appealed to the Federal Circuit on June 10, 1991. The appeal was denied on the basis that no legal or factual error had been shown, November 26, 1991. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

5 U.S.C. § 7513 (b) (2) **Cause and procedure** An employee against whom an action is proposed is entitled to a reasonable time, but not less than 7

days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

STATEMENT OF THE CASE

Petitioner had been a marine shipfitter employed in Federal service at Puget Sound Naval Shipyard, Bremerton, Washington for 4 years in a career status. On July 14, 1988 petitioner took a qualifying test with his former spouse Linda Schwarman for an apprentice position at Puget Sound Naval Shipyard. At that time petitioner was completing an apprenticeship at Puget Sound Naval Shipyard as a shipfitter.

Subsequently, several phone calls were received at Puget Sound Naval Shipyard claiming misconduct on the part of the petitioner and his former spouse.

Specifically, that he, the caller, was in the testing room and saw petitioner switch test papers with his former spouse and heard them bragging about it. The caller was and remains anonymous.

Based on the above, the Office of Personnel Management initiated an investigation. The Office of Personnel Management investigator Harry Peterson interviewed petitioner, his former spouse and several employees at Puget Sound Naval Shipyard; an affidavit was supplied by petitioner and his former spouse. The investigator also procured several documents of petitioner along with handwriting samples provided by petitioner and his former spouse.

These documents along with selected test documents of petitioner and his former spouse were submitted to a questioned documents examiner Mr. Jan Beck.

In his report of November 1, 1988, Mr. Beck concluded:

> 1. That neither Mark nor Linda Schwarman wrote his or her answer sheets; and
>
> 2. That there are indications that each person wrote the other's answer sheets.

In the same report he also stated:

> "My use of the term 'indications' is necessitated by the relatively limited amount of handwriting on the answer sheets and by the fact that the signatures in question are deliberately executed simulations of the actual person's handwriting, thus preventing a complete analysis or a definite conclusion."

On June 21,1989, petitioner received a notice of proposed removal as a result of the investigation. The proposal stated:

> "The reason for the proposed action is your collusion in examination with Linda Schwarman for the purpose of taking the test for her and thereby fraudulently establishing her eligibility.... In view of the potential disqualification and our

> proposal to instruct your agency to remove you from its rolls, you may answer this notice either Orally in person, or in writing or both...Full consideration will be given to any answer you submit"

Petitioner requested the opportunity to make an oral response and the record relied on that formed the basis of the proposal. Petitioner was denied the record. An oral response was given by petitioner on October 12, 1989; present were Mark Schwarman, petitioner, Fred Leatherman petitioner's attorney, Steven Beal, president of petitioner's labor union. The oral response has been a disputed fact. The agency stated in its decision letter:

> "When contacted on October 12,1989 for your oral response, which was to involve our investigator asking you a number of questions previously written and then record your oral answers for each question, you declined to provide an oral response, instead providing our investigator with a prepared affidavit."

Further, in all briefs, arguments and submissions before the Merit Systems Protection Board, the agency unequivocally

argued that the petitioner never made an oral response; however, in the respondents informal brief before the Federal Circuit respondent now admits:

> "...OPM's decision letter erroneously stated that he had made no oral response to the proposed action of removal."

Thus petitioner is not sure if respondent still disputes the fact that an oral response was made. The oral response was made to an Office of Personnel Management investigator Mr. tom Cullen. The response lasted 1 hour and 45 minutes.

On May 25,1990 respondent issued a decision letter ordering petitioner seperated from the rolls of his agency. Petitioner filed an appeal on July 9,1990 with the Merit Systems Protection Board on the written record. OPM's decision was affirmed. The tryer of fact determining that the handwriting analysis along with circumstantial evidence met the requirements of a preponderance of

evidence.

Petitioner raised the affirmative defense that the respondent committed an harmful procedural error by not considering petitioners oral response. The tryer of fact ruled:

> "assuming OPM error as alleged by appellant, I find appellant has failed to establish harm.... Nor is there any evidence that OPM would have reached a different conclusion after consideration of appellant's written and oral response."

In due course petitioner filed a petition for review with the full Board again citing harmful procedural error. The petition was denied on May 14, 1991.

Petitioner filed an appeal with the United States Court of Appeals for the Federal Circuit again citing the agencies disregard for granting petitioner an oral response and ignoring it. The appeal was denied and the judgment entered November 26, 1991.

REASONS FOR GRANTING THE WRIT

The respondents denial of an oral response denies petitioner of due process and conflicts with other decisions of Courts and Circuits.

This decision conflicts with the decision in Ricucci v. United States, 425 F. 2d 1252 (1970). In Riccuci the appellant was allowed to make an oral response also to an investigator. The investigator was not an appropriate agency official to hear a reply. The court held the failure to award a proper opportunity for an oral reply to an employee who is entitled to this right and who requests it, is a fatal defect in an adverse action. Ricucci at 1254. The reply is to be a meaningful response. it is not to be a futile ritual. Ricucci at 1254.

In the instant case petitioner made an oral response and did engage in a futile ritual. Respondent obliterating

petitioner's response. Further, by the statement made by respondent in the decision letter, respondent considered petitioners oral response another investigative opportunity and not petitioners own response. The tryer of facts ruling that no harm was shown because another forum was provided by the Board is flawed because it cripples the affirmative defense of harmful error by offering a Board hearing as a cure Per Se to all procedural errors always making the harm moot. The tryer of fact employs an argument that the respondent cannot employ- an agency action appealable to the Board may not be sustained on how an agency might have acted had it followed proper procedures. Padilla v. Equal Employment Opportunity Commission, SF07528110845 (1983), citing Horne v. MSPB, 684 F.2d 155, 157-58(D.C. Cir. 1982).

CONCLUSION

The right to make a response to charges by the accused is a vital component of due process and should not be abrogated or abridged for convenience. If respondent may delete petitioner's response, any response may be deleted. For the reasons set forth this petition for certiorari should be granted.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SEATTLE REGIONAL OFFICE

MARK M. SCHWARMAN, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency.	)	DOCKET NUMBER SE07549 DATE: November 6, 1990

Jeffrey G. Letts, Esqure, Silverdale, Washington for the appellant.

Wade M. Plunkett, Esquire, Washington, D.C., for the agency.

BEFORE

Carol J. Teather

Administrative Judge

INITIAL DECISION

INTRODUCTION

By appeal deemed timely filed July 9, 1990,[1] appellant appealed a final decision of the Office of Personnel Management (OPM) finding him unsuitable for Federal employment, directing his removal from his Federal position effective July 8, 1990, and barring him from competition for or appointment to any position in the competitive Federal service until June 27, 1992. The Board has jurisdiction over appellant's appeal under 5 U.S.C § 7701(a) and 5 C.F.R. § 754.105(a) (1990).

Appellant waived his right to a hearing and this case was decided on the written record. For the reasons set forth below, OPM's decision is AFFIRMED.

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[1] Appellant's appeal was filed July 3, 1990. As it was only a few days premature, it was held and docketed on July 9, 1990, the day following the effective date of appellant's removal.

FINDINGS AND ANALYSIS

Facts

Appellant was employed as a Shipfitter, WG-10, with the Department of the Navy at Puget Sound Naval Shipyard in Bremerton, Washinton.[2] On July 14, 1988, he and his former wife, Linda Schwarman, took an OPM trades apprentice examination in Seattle, Washington. While taking the examination, they sat in the same row with an empty chair between them upon which they placed their personal belongings.[3]

Sometime near the end of July 1988, a student aid in the Special Examining Unit at Puget Sound Naval Shipyard, Debora L. Carson, received an anonymous telephone call from a man who said that he had taken the apprentice examination in Seattle

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[2] see Standard Form (SF) 50 documenting promotion, Appeal file tab 7, subtab 2v.

[3] Affidavit of Linda Schwarman dated September 26, 1988, Appeal file tab 7, subtab 2r: signed letter of appellant dated September 27, 1990, Appeal file tab 17.

and had observed appellant and Linda Schwarman switch their test papers before handing them in. The caller also said that he had overheard the Schwarmans bragging about what they had done. The caller did not report his observations to the examination proctors and provided no details to Ms. Carson.[4] The same anonymous informer also provided this information to Puget Sound Naval Shipyard Supervisory Staffing Specialist Joene E. Lott sometime in the middle of September 1988.[5] As a result of these anonymous calls, OPM conducted an investigation into the origins of the examinations turned in by appellant and Linda Schwarman. Upon completion of this investigation, and after providing

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[4] Affidavit of Debora L. Carson dated October 20, 1988, Appeal file tab 7, subtab 2m.

[5] Affidavit of Joene E. Lott dated October 17, 1988, Appeal file tab 7, subtab 2p. See also affidavit of Staffing Assistant Dianne M. Campbell dated October 17, 1988, Appeal file tab 7, subtab 2o.

appellant with notice and an opportunity to respond, OPM issued a final decision finding appellant unsuitable for Federal employment based on a charge of collusion in examination with Linda Schwarman for the purpose of taking the apprenticeship test for her and thereby fraudulently establishing her eligibility for an apprentice position.[6] OPM directed the Department of the Navy, Puget Sound Naval Shipyard, to separate appellant from its rolls on the 25th calendar day following his receipt of OPM's decision and, in addition, barred appellant from competitive Federal service until June 27, 1992.[7] Appellant appealed OPM's decision to the Board stating that he did not commit the charged misconduct and alleging

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[6] OPM decision dated May 25, 1990, Appeal file tab 7, subtab 2b.

[7] Id.

harmful procedural error.[8]

Applicable law

OPM may instruct an agency to remove an appointee when OPM determines this action will promote the efficiency of the service. 5 C.F.R. § 731.201 (1990). In making a negative suitability determination, OPM must show by preponderant evidence conduct on the part of the individual that may reasonably be expected to interfere with or prevent (1) effective performance of the individual in the position in which he is employed, or (2) effective performance by the employing agency of its duties and responsibilitites. 5 C.F.R. § 731.202(a) (1990). Specific factors that may be considered in assessing an individual's suitability are set forth at 5 C.F.R. § 731.202(b) and (c) (1990).

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[8] See appeal, Appeal file tab 1, and memorandum of conference dated August 29, 1990, Appeal file tab 12.

OPM has estabished that the apprenticeship examination submitted by appellant as his own was not prepared by him.

OPM found appellant unsuitable for Federal employment on the basis of intentional false statements or deception or fraud in examination or appointment. Specifically, OPM alleged appellant took an apprenticeship examination for his former wife, Linda Schwarman. In support of its decision, OPM submitted the opinion of Jan Beck, Examiner of Questioned Documents,[9] who concluded:

> 1. That neither Mark nor Linda Schwarman wrote his or her own answer sheets; and
>
> 2. That there are indications that each person wrote the other's answer sheets.[10]

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[9] Based on his resume, Jan Beck is well qualified as a document examiner and handwriting expert. Appeal file tab 7, subtab 21.

[10] See opinion of Jan Beck dated November 1, 1988, Appeal file tab 7, subtab 21.

Mr. Beck found specific handwriting differences between the apprenticeship examination answer sheets and the known handwriting samples of the person named on the answer sheets. His findings were set forth in detail in his opinion letter[11] and supported by copies of the examined documents contained in the record.[12] Furthermore, after examining and comparing the handwriting on the tests handed in by Linda Schwarman and appellant and the samples of their handwriting, particularly the examples of handwriting prior to July 14, 1988, and what appeared to be a deliberate change in appellant's signature on

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[11] Id.

[12] See Appeal file tab 7, subtabs 2s, 2t, and 2u.

or about July 13, 1988,[13] I reached the same conclusion as the handwriting expert.

The agency also submitted documentation showing that (1) appellant's average grade for apprentice examinations taken during the period December 1984 through June 1988 was 95.4 and that his lowest grade during this period was an 81 in "Mechanical Drawing/Materials and Processes" which he received in 1985:[14] (2)

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[13] Compare appellant's signature on (1) Office of Workers' Compensation Programs claims for injuries on January 14, 1988, May 7,1985, September 4, 1985, November 27, 1984, and December 17, 1984, (2) Declaration of Appointee dated October 1, 1984, (3) Application for 10-point Veteran Preference dated July 13, 1984, (4) Application for Leave dated July 18, 1988, and (5) Federal Employees Health Benefits form signed December 7, 1984, Appeal file tab 7, subtab 2t, with appellant's signature on documents he signed on July 13, 1988, and on subsequent dates in connection with the apprenticeship examination and OPM's investigation. I also noted that there is some semblance of appellant's signature prior to July 13, 1988, in his signature on a letter to Roy Hocker. Appeal file tab 16, subtab F.

[14] Appeal file tab 7, subtab 2x.

appellant was ranked as number one on a certificate of eligibles for the position of Trades Apprentice in July 1984;[15] and (3) appellant was given advance credit towards completion of his apprenticeship as a shipfitter and promoted to journey man shipfitter on July 12, 1988.[16] It is undisputed that on the July 14 1988, apprenticeship examination taken by appellant and his former wife, appellant's score was 86.8, including 10 veterans preference points, and Linda Schwarman's score was 96.3 without any veterans preference point's.[17]

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[15] Id.

[16] Appeal file tab 7, subtab 2v.

[17] See OPM letter to appellant dated June 9, 1989, Appeal file tab 7, subtab 2k, and appellant's responses, Appeal file tab 7, subtabs 2e, 2g, 2i, 2j, 2n, and 2q.

In affidavits dated September 26, 1990, appellant and Linda Schwarman denied that they had switched examinations.[18] Appellant's explanation for his low score was that he had gotten little sleep the night before, was feeling ill, and found the examination room to be crowded and stuffy with inadequate workspace.[19] In support of his claim of illness, appellant pointed to the fact that he took sick leave the day of the test and the day after.[20] There was no explanation given for Linda's high score. Furthermore,

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[18] See Appeal file tab 7, subtabs 2q and 2r.

[19] See appellant affidavit, Appeal file tab 7, subtab 2q.

[20] Appellant actually said "I was feeling ill and in fact took the next two days off from work on sick leave." Appellant affidavit, Appeal file tab 7, subtab 2q. The record, however, reflects that appellant took the day of the test -- July 14, 1988, -- and the day after off on sick leave. See Application for Leave signed by applellant July 18, 1988, and Route Sheet showing leave taken by appellant in July 1988, Appeal file tab 7, subtabs 2t and 2x.

there is nothing in the record regarding Ms. Schwarman's academic ability, prior experience, work record, or study habits upon which to make a finding as to the likelihood or reasonableness of her high score.

In view of appellant's outstanding performance as an apprentice, as shown by the statements of Group Superintendent, Structural, John D. Frey and appellant's early promotion to journeyman shipfitter,[21] and his high scores on previous apprentice tests,[22] I found appellant's explanation for his low score on the July 14th apprenticeship test incredible.[23] With his record, I cannot find that a minor illness and some discomfort would cause appellant

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[21] Appeal file tab 7, subtab 2v.

[22] Appeal file tab 7, subtab 2x.

[23] In making credibility determinations, to the extent possible, the factors set forth by the Board in Hillen V. Department of the Army, 35 M.S.P.R. 453, 458 (1987) were utilized.

to do so poorly on an apprenticeship test. Furthermore, any illness suffered by appellant on July 14th must have been minor as shown by the fact that appellant traveled from Bremerton to Seattle to take a test it was not necessary for him to take as he was already a journeyman shipfitter, and the lack of any medical documentation showing that appellant sought medical assistance for an illness on July 14 or 15, 1988. In addition, appellant made no attempt to describe his symptoms or to explain how his cognitive ability on July 14, 1988, was impaired by illness or discomfort. As the reason or reasons why appellant's test score on the July 14, 1988, apprenticeship examination was so out of line with his other test scores, his experience and his work was soley within the knowledge of appellant, and possibly Ms. Schwarman, it is reasonable to assume that appellant would

have provided a more detailed explanation if in fact he had not switched papers with Linda Schwarman.

I also found appellant's explanation for taking the apprenticeship test on July 14th did not ring true. Appellant said that he took the test because he was feeling dissatisfied with his position after having received a written reprimand in May 1988.[24] Appellant did not receive a reprimand in May 1988, however it was March 1988. On February 24, 1988, appellant was issued a proposed two-day suspension for failing to report for scheduled training on February 18, 1988, and for not notifying his shop as to the reasons for his absence. The proposed suspension was mitigated to a written

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[24] See appellant affidavit, Appeal file tab 7, subtab 2q.

[25] Appeal file tab 7, subtab 2w.

reprimand by Shipfitter Superintendent P. Brochner on March 17, 1988.[25] Furthermore, the reprimand was only for a period of two years and would be removed from appellant's record after that ime.[26] In view of appellant's promotion on July 12, 1988, I find it difficult to believe such a minor discipline would cause appellant to be dissatisfied with his promotion.[27]

Based on the opinion of Jan Beck, appellant's prior high test scores and his highly successful work record, the

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[25] Appeal file tab 7, subtab 2w.

[26] Id.

[27] In a letter dated September 18, 1990, appellant staed that he presented several exhibits during his oral response to OPM showing that he was not happy in his current shop and was seeking employment with other agencies. He also stated that the test scores submitted by OPM were really a weighted average of a quarter of school and that in fact his lowest score on an apprenticeship examination was 60%. He did not however, submit copies of the exhibits he said were provided to OPM regarding his unhappiness with his position or any evidence supporting his claim of a 60% grade on an apprenticeship examination.

fact that appellant's very low score on the July 14, 1988, apprenticeship examination was an aberration, and the lack of any evidence or explanation justifying Linda Schwarman's very high score, I find it more likely to be true than not true that the examination containing appellant's name was not prepared by him and that he prepared the examination containing Linda Schwarman's name. See Acosta v. United States, 369 F.2d 41 (4th Cir. 1966). cert. denied, 386 U.S. 921 (1967) (testimony of document examiner sufficient to establish beyond a reasonable doubt that defendant forged endorsements on four United States Bonds). See also Chatman v. United States, 557 F.2d 147, 148 (8th Cir. 1977), cert. denied, 434 U.S. 863 (1977) (testimony of handwriting expert, coupled with jury's independent examination of handwriting exemplars and the check endorsement, may

be sufficient to support a conviction for falsely altering and forging a United States Treasury check). Cf. United States V. Woodson, 526 F.2d 550, 551 (9th Cir. 1975) (no reason why handwriting comparisons cannot be made by jurors, and conclusions drawn from them, either in the presence or absence of expert opinion).

Appellant submitted statements from a number of supervisors and a union offical at Puget Sound Naval Shipyard regarding the quality of appellant's work, his honesty and his dependability.[28] I have no reason to believe that such evidence is not true and that appellant was an honest and hardworking employee at Puget SOund Naval Shipyard. This fact, however, does not excuse appellant's

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[28] See appeal file tab 16, subtabs D, E and G. See also Appeal file tab 16, subtabF.

dishonest conduct in taking an apprenticeship examination for Linda Schwarman. Such misconduct is serious as both OPM and an employing agency must be able to rely on test scores as a reflection of an individual's aptitude and ability to perform the duties and functions of a particular position. Appellant's misconduct interfered with and prevented such reliance in the case of himself and Linda Schwarman with respect to the July 14, 1988, test scores.

Conclusion

Intentional false statement or deception or fraud in examination may be considered a basis for disqualification for Federal employment. 5 C.F. § 731.202 (b)(3) (1990). I find OPM has estabished by preponderant evidence that its negative suitability decision promotes the efficiency of the service.

Appellant has not established his affirmative defense.

Appellant alleges that OPM committed harmful procedural error by not considering his oral response in violation of 5 C.F.R. § 754.103(a) and by not providing him with a copy of its complete investigative report before he was required to the proposed action. Appellant has the burden of proof by a preponderance of the evidence over this affirmative defense. See 5 C.F.R. §§ 1202.56(a)(2)(iii) and (b)(1) (1990).

Harmful error is defined by 5 C.F.R § 1202.56(c)(3) as "[e]rror by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error." Assuming OPM error as alleged by appellant, I find

Appellant has failed to establish harm. There is nothing to show that appellant's response to the charges would have been different had he been given a complete copy of the investigative report. Nor is there any evidence that OPM would have reached a different conclusion after consideration of appellant's written and oral response. In fact, the evidence is to the contrary. The complete report was available to appellant during the course of these proceedings. His response to the charges, however, remained the same. Furthermore, full consideration was given to all of appellant's responses, arguments, and submissions; yet, the conclusion reached was the same.

Appellant has not establish his affirmative defense.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____

Carol J. Teather

Administrative Judge

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MARK M. SCHWARMAN, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency.	DOCKET NUMBER SE07549 010481 DATE: May 14, 1991

Jeffrey G. Letts, Esquire, Silverdale, Washington, for the appellant.

Wade M. Plunkett, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman

Antonio C. Amador, Vice Chairman

Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on November 6, 1990, because it does not meet the criteria for review set forth at 5 C.F.R. § 1202.115. In reaching its decision, the board did not consider the Office of Personnel Management's untimely response to the appellant's petition for review, because it was filed without the requisite good cause showing. This is the Board's final order in this appeal. 5 C.F.R. § 1202.113(c).

FOR THE BOARD:

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Robert E. Taylor

Clerk of the Board

Washington, D.C.

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

91-3405

MARK M. SCHWARMAN,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: November 26, 1991

Before NIES, Chief Judge, MARSHALL, Associate Justice (Retired), Supreme Court of the United States, sitting by designation, and FRIEDMAN, Senior Circuit Judge.

PER CURIAM.

Mark M. Schwarman appeals the final decision of the Merit Systems Protection Board in No. SE07549010481[1] which affirmed the final decision of the Office of Personnel Management finding him unsuitable for federal employment, directing Schwarman's removal from his federal position and barring him from competition for or advancement to any position in the competitive federal service until June 27, 1992. Schwarman was found to have submitted an apprenticeship examination which was not prepared by him. The handwriting expert's testimony that Schwarman did not write his examination was unequivocal and circumstantial evidence also supports that conclusion. This evidence is more than

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[1] The Initial Decision by the administrative judge became the final decision of the Board upon the Board's denial of Schwarman's petition for review. 5 C.F.R. § 1201.113(b).

sufficient to satisfy the substantial evidence standard of review. It is immaterial that the expert could not testify as firmly that Schwarman wrote his wife's examination and that she wrote his. The charged offense is met on the basis of his submission of an examination as his which he did not write. Accordingly, because no legal or factual error has been shown, this court affirms on the basis of the administrative judge's opinion.